BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of:	)	
	)	
Council for Responsible Government, Inc. and its Accountability Project	)	
	)	
Gary Glenn	)	MUR 5024R
	)	
William "Bill" Wilson	)	
	)	

GENERAL COUNSEL'S REPORT #2*

I. INTRODUCTION

This matter is before the Commission on remand from the United States District Court for the District of Columbia, where the Commission is a defendant in a suit brought by the Kean for Congress Committee to obtain judicial review of the dismissal of its administrative complaint in this matter. *See* 2 U.S.C. § 437g(a)(8). The district court remanded the case for 60 days to allow the Commission to reconsider this matter in light of the Supreme Court's decision in *McConnell v. FEC*, 124 S.Ct. 619 (2003). *See* Attachment 1 (Order dated February 15, 2005). In this Report, we analyze the impact of *McConnell* on this matter and recommend that the Commission find reason to believe that the Council for Responsible Government, Inc. and its Accountability Project violated the Act.

II. HISTORY OF THE CASE

A. The Enforcement Matter

The Kean for Congress Committee ("the Kean Committee") is the principal campaign committee of Thomas Kean, Jr., a candidate in the June 6, 2000, Republican primary election in

* The First General Counsel's Report in this matter was designated MUR 5024, not MUR 5024R. This is the initial post-remand General Counsel's Report.

New Jersey's seventh congressional district. In late May 2000, the Kean Committee filed an administrative complaint with the Commission alleging that the Council for Responsible Government, Inc. and its Accountability Project ("the Council") violated the Act. The Council is not registered with the Commission as a political committee; it is a Virginia corporation that has elected to characterize itself for tax purposes as a "political organization" under Section 527 of the Internal Revenue Code.[1] The complaint alleged that the Council made prohibited corporate expenditures that were coordinated with Kean's opponent and that the Council should be registered and reporting as a political committee. To support its allegations, the complaint attached two brochures financed and distributed by the Council that criticize Kean's fitness for federal office. In response to the complaint, the Council denied being a political committee and argued that the brochures constituted protected issue advocacy, not express advocacy.

In the First General Counsel's Report, dated September 3, 2003, which is incorporated herein by reference, this Office recommended that the Commission find reason to believe that the Council violated the Act by making prohibited expenditures, or in the alternative, by failing to register and report as a political committee. The recommendations stemmed from this Office's conclusion that the brochures constituted express advocacy. *See* First GCR at 13-15. Specifically, this Office found that the brochures constituted express advocacy under 11 C.F.R. § 100.22(a), the first part of the Commission's two-part regulation defining "expressly advocating." The Report did not discuss whether the communications would also have constituted express advocacy under 11 C.F.R. § 100.22(b).[2]

[1] The law requiring certain Section 527 organizations to notify the IRS of their status and to file reports became effective on July 1, 2000, after the initial alleged violations in this matter.

[2] For the Commission's convenience, 11 C.F.R § 100.22 is attached to this Report as Attachment 2.

The Commission considered the First General Counsel's Report during the Executive Session on November 4, 2003, and was evenly divided on a vote to adopt this Office's recommendations. The Commission subsequently voted unanimously to dismiss the Kean Committee's complaint and close the file in this matter. Two Statements of Reasons were subsequently issued: one by the three Commissioners who voted against this Office's recommendations ("the controlling group"); and one by the three Commissioners who voted in favor of the recommendations.

The controlling group explained that they had voted against finding reason to believe because the brochures did not contain express advocacy. *See* Statement of Reasons by Commissioners Mason, Smith, and Toner ("SOR") at 1. The SOR quoted from 11 C.F.R. § 100.22(a) and commented that the regulation tracks the Supreme Court's opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976). *Id.* As with the First General Counsel's Report, the SOR did not address how section 100.22(b) would apply to the facts of this case, and it mentions that regulation only in a footnote stating that the subsection "has been held unconstitutional." SOR at 2 n.5. The SOR argues, however, that the brochures do not appear to constitute express advocacy even under the standard propounded in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), which to an extent informed the development of section 100.22(b).

B. The District Court Litigation

Pursuant to 2 U.S.C. § 437g(a)(8), the Kean Committee filed suit for judicial review of the dismissal of its administrative complaint. The Commission moved to dismiss the case for lack of standing, but the court recently denied that motion, allowing the case to proceed on the Kean Committee's previously filed motion for summary judgment on the merits. *See* Order dated January 25, 2005. In its summary judgment motion, the Kean Committee offers two major

arguments why the dismissal of the administrative complaint was contrary to law.[3] First, it argues that the brochures are express advocacy because they can only be reasonably read as urging the defeat of Kean. *See* Sum. Judg. Mem. at 12-27. The Kean Committee purports to find support for this conclusion in *McConnell*, which it argues "made clear that *Buckley* and its progeny do not require 'magic words' as a prerequisite to an express advocacy finding." Sum. Judg. Mem. at 19-20; *see also id.* at 15-16, 20.

Second, the Kean Committee attacks the controlling group for only mentioning 11 C.F.R. § 100.22(b) in a footnote and not applying the provision to the brochures in question. *See* Sum. Judg. Mem. at 30-33. It cites a line of cases holding that an agency must adhere to its own rules and regulations and cannot make *ad hoc* departures from those rules. *See, e.g., Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1980). Finally, the Kean Committee contends that section 100.22(b) remains in effect despite prior circuit rulings that the regulation is unconstitutional because "*McConnell* ... makes abundantly clear that those courts were wrong on the law." Sum. Judg. Mem. at 32.

Although the Kean Committee relies on *McConnell*, the Commission's deliberations and vote in this matter occurred before the Supreme Court issued its opinion in that case. In addition, neither of the statements of reasons issued in this matter considered whether *McConnell* impacted the doctrine of express advocacy, generally, or section 100.22(b), in particular. Nor for that matter did this Office raise the subject after *McConnell* was issued. Accordingly, the district court granted the Commission's request to remand the case for 60 days to allow the Commission an opportunity to consider what impact, if any, *McConnell* has on the facts of this case. *See*

[3] The Kean Committee's Motion for Summary Judgment was previously circulated to the Commission. Additional copies are available upon request.

Attachment 1. As applied to this matter, *McConnell* relates principally to whether the Commission must apply or disregard 11 C.F.R. § 100.22(b).[4]

III. THE IMPACT OF *MCCONNELL* ON 11 C.F.R. § 100.22(b)

"It is elementary that an agency must adhere to its own rules and regulations." *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). As the D.C. Circuit has stated, the Commission's unwillingness to enforce its own regulations would in itself "establish that such agency action was contrary to law" in a suit under 2 U.S.C. § 437g(a)(8). *See Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995). Thus, unless *McConnell* clearly invalidated section 100.22(b), the Commission would have no legitimate basis to disregard it in this matter.

McConnell's discussion of express advocacy centered on two general propositions. First, *Buckley's* express advocacy test represented a statutory construction, not a constitutional ceiling for the regulation of election-related speech. 124 S.Ct. at 688. Second, the so-called "magic words test" has in practice become so easily evaded as to be "functionally meaningless." *Id.* at 689. These propositions led the Court to uphold BCRA's electioneering communications provision, which covered considerably more speech than express advocacy. *Id.* On the other hand, the Court invalidated BCRA's "choice" provision, which required political parties to give up a valuable benefit—making Section 441a(d) coordinated expenditures—if they wished to engage in independent express advocacy. *Id.* at 702. This "choice" provision, the Court held, was so useless as a loophole-closing measure that it placed a constitutionally unsustainable

[4] *McConnell's* impact on this matter must be considered because the Supreme Court's ruling "is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate ... [the Court's] announcement of the rule." *Harper v Virginia Dep't of Taxation*, 509 U S 86, 97 (1993).

burden on party committees. *Id.* (noting that the government has no meaningful interest "in requiring political parties to avoid the use of magic words").

There are only two ways that *McConnell* could support a decision to disregard section 100.22(b). First, if *McConnell* declared section 100.22(b) unconstitutional, then the Commission certainly could not apply it. Yet as discussed below, *McConnell* unequivocally rejected the argument that express advocacy is a constitutional construct, thus overruling prior court decisions invalidating section 100.22(b) on constitutional grounds.[5] Second, if *McConnell* construed "express advocacy" in a manner inconsistent with section 100.22(b), then the Commission likewise could not apply the regulation. But as discussed below, section 100.22(b) fits squarely within the Court's construction of express advocacy. We therefore conclude that in light of *McConnell*, 11 C.F.R. § 100.22(b) must be applied to this matter.

A. *McConnell* Leaves Section 100.22(b) on Firm Constitutional Ground

Prior to *McConnell*, several federal courts held that the Supreme Court made a crucial constitutional distinction between express advocacy and issue advocacy in *Buckley*, effectively limiting the Commission's enforcement authority to communications containing express advocacy. *See, e.g., Virginia Society for Human Life v. FEC*, 263 F.3d 379, 391 (4th Cir. 2001) ("*VSHL*"); *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996) (adopting the reasoning of the district court in *Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Maine 1996)). These courts read *Buckley and FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), as drawing a constitutionally mandated line at the so-called "magic words" and held

[5] *See McConnell*, 124 S.Ct. at 737, n.11 (Scalia, J., dissenting) ("The Court, in upholding most of its provisions by concluding that the 'express advocacy' limitation derived by *Buckley* is not a constitutionally mandated line, has, in one blow, overturned every Court of Appeals that has addressed this question (except, perhaps, one).").

that section 100.22(b) fell on the impermissible side of that line.[6] *See VHSL*, 263 F.2d at 392; *Maine Right to Life*, 914 F. Supp. at 11-12.

In *McConnell*, however, the Court made clear that express advocacy, and particularly "what is now known as the 'magic words' requirement," did not represent a constitutionally mandated line beyond which no regulation was possible. 124 S.Ct. at 687. The Court explained:

> A plain reading of *Buckley* makes clear that the express advocacy limitation ... was the product of statutory interpretation rather than a constitutional command. ... [O]ur decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.

Id. at 688.

By stating that the express advocacy limitation was a statutory construction rather than a constitutional imperative, the Supreme Court essentially overruled past decisions invalidating section 100.22(b) on constitutional grounds. 124 S.Ct. at 650-651, 687-689. In addition, *McConnell* offers no new grounds upon which to conclude that section 100.22(b) is unconstitutional.[7] Therefore, *McConnell* does not provide any support for the Commission to disregard section 100.22(b) on constitutional grounds.

B. *McConnell* Does Not Otherwise Affect the Validity of Section 100.22(b)

Neither does *McConnell* provide any other basis for the Commission to disregard section 100.22(b). *McConnell* did not involve a challenge to the express advocacy test or its application, did not purport to determine the precise contours of express advocacy, and did not address the validity of section 100.22(a) or (b). In fact, the Court never cited section 100.22 in *McConnell*.

---

[6] At times, some Commissioners have expressed agreement with this rationale. *See, e g*, MUR 4922 (Suburban O'Hare Commission), Statement of Reasons by Commissioners Smith and Mason.

[7] For example, the Court found no constitutional problems with BCRA's regulation of "electioneering communications," concluding that the communications were "the functional equivalent of express advocacy." *Id* at 696. Likewise, the Court rejected a constitutional vagueness challenge to the "promote, attack, support, or oppose" standard that gives rise to restrictions on state and local party committees, 2 U.S.C. § 441i(b)(1) and (d), and on fundraising by federal candidates, 2 U.S.C § 441i(e)(1)(A) *Id* at 675, n 64

McConnell principally discussed express advocacy to afford context in considering whether an alternative standard was sustainable.

In discussing the provisions of BCRA, the Court emphasized that the concept of express advocacy is a narrow one, but it did not specify how narrow. In fact, *McConnell* does not reveal any more about the exact contours of express advocacy than *Buckley* did. For instance, neither *Buckley* nor *McConnell* elaborated on the permissible use of context to discern what speech is or is not express advocacy. Yet the context and timing of a communication are critical to making such a determination: the phrase "Support President Bush" has a vastly different meaning two days before Election Day than it does two days after Election Day. The Commission recognized the necessity of considering context when it promulgated section 100.22, adding a context element to both 100.22(a) and 100.22(b). *See* 60 Fed. Reg. at 35295 (June 6, 1995). The Supreme Court, however, has been virtually silent on the intersection of express advocacy and context, noting only in *MCFL* that isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy. 479 U.S. at 249-250.

The Commission's definition of express advocacy not only fills the gaps left by the Supreme Court, but it is also in harmony with *McConnell's* emphasis on the language contained in the communication. Section 100.22(b), for example, is limited to communications that contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and one in which "reasonable minds could not differ" that it encourages actions to elect or defeat a candidate. These restricting terms ensure that section 100.22(b) will encompass only a "tiny fraction of the political communications made for the purpose of electing or defeating candidates during a campaign." *McConnell*, 124 S.Ct. at 702.

By its very terms, section 100.22(b) is a carefully tailored provision, and everything that the Supreme Court stated in *McConnell* about the nature and limitations of express advocacy applies to section 100.22(b). Indeed, many communications will fall outside the scope of the regulation, from genuine issue ads that urge viewers to contact their representatives and urge them to vote against a certain bill, to "sham" issue ads that appear the day before an election criticizing a candidate's position on an issue. As long as a communication can be reasonably interpreted to call for an action other than voting against a candidate—such as urging a candidate to change his or her position on an issue—the ads will not pass muster as express advocacy under section 100.22(b).

In sum, insofar as the "express advocacy limitation ... [is] the product of statutory interpretation rather than a constitutional command," there is nothing in *McConnell* establishing that the Court's statutory interpretation is any narrower than section 100.22(b). *McConnell*, 124 S.Ct. at 688. The Act broadly empowers the Commission to "formulate policy," 2 U.S.C. § 437c(b)(1), and "to make, amend, and repeal such rules ... as are necessary to carry out the provisions of [the] Act." 2 U.S.C. § 437d(a)(8). *See also* 2 U.S.C. §§ 438(a)(8), 438(d). Section 100.22(b) is consistent with both the Constitution and with the Commission's authority to interpret the Act. Therefore, the regulation must be applied to the current matter.[8]

[8] The Commission has cited section 100.22(b) approvingly in other contexts since *McConnell* was decided. *See, e.g.*, Advisory Opinion 2004-33 (Ripon), Campaign Guides for Candidates and Party Committees. Also, in 2003, when determining what rulemakings were necessary to implement *McConnell*, the Commission did not choose to reopen section 100 22(b). In addition, prior to *McConnell*, the Commission refused to initiate a requested rulemaking to repeal section 100.22(b) and also successfully persuaded the Fourth Circuit to vacate the district court's nationwide permanent injunction on enforcing that regulation. *See VSHL*, 263 F.3d at 392-93.

IV. ANALYSIS OF THE BROCHURES IN THIS MATTER

In its complaint, the Kean Committee included two brochures funded and distributed by the Council that attack Kean's qualifications for federal office.[9] As explained below, this Office concludes that these brochures constitute express advocacy under both 11 C.F.R. §§ 100.22(a) and 100.22(b) because the brochures use words and phrases that exhort readers to vote against Kean. Consequently, the facts support finding reason to believe that the Council failed to register and report as a political committee or, alternatively, that it made prohibited corporate independent expenditures.

A. The Brochures Constitute Express Advocacy Under 11 C.F.R. § 100.22(a)

In the First General Counsel's Report, this Office concluded that the brochures contain express advocacy under 11 C.F.R. § 100.22(a) because the communications use words which in context can have no other reasonable meaning than to urge Kean's defeat. *See* First GCR at 13-15. Nothing in *McConnell* changes this analysis, and this Office therefore reaffirms its prior conclusion that the brochures qualify as express advocacy under this section. *See id.*

B. The Brochures Constitute Express Advocacy Under 11 C.F.R. § 100.22(b)

The brochures distributed by the Council epitomize the narrow class of express advocacy that section 100.22(b) was designed to capture. The brochures were distributed in Kean's congressional district after he announced his candidacy and during the months immediately preceding the primary election. With limited reference to this context, the electoral portions of the brochures are "unmistakable, unambiguous, and suggestive of only one meaning"—to vote against Kean. 11 C.F.R. § 100.22(b)(1). Both brochures are also subject to only one reasonable

[9] Color copies of the brochures were circulated to the Commission in a memorandum dated September 4, 2003. Additional copies are available upon request.

interpretation of their call to action—to vote against Kean. *See* 11 C.F.R. § 100.22(b)(2). Indeed, outside the context of the election, the brochures are virtually meaningless.

The first brochure does not even mention any public issues. It only criticizes Kean's qualifications to serve in office and places the boldfaced term "**NEVER**" directly under a picture of Kean wearing a campaign emblem stating "Tom Kean Jr. for Congress." Likewise, the second brochure directly references Kean's campaign for Congress and attacks his lack of political experience. These references to Kean's congressional campaign, combined with the lack of any other message, demonstrate that the brochures are exclusively and unmistakably electoral in content. In addition, both communications use words that effectively direct readers to vote against Kean. For example, after criticizing Kean's character and qualifications for office, the brochures tell people "**NEVER**" and "Tell Tom Kean Jr. ... **NEW JERSEY NEEDS NEW JERSEY LEADERS.**"

These brochures represent precisely the type of communications that the Commission envisioned when it promulgated section 100.22. *See* 60 Fed. Reg. 35292, July 6, 1995. In its discussion of then-newly promulgated section 100.22, the Commission stated that "communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *Id.* at 35295. Here, the only thing a reader can do to ensure that New Jersey *has* New Jersey leaders is to vote against Kean. Therefore, because the brochures are "unmistakable, unambiguous, and suggestive of only one meaning" and because reasonable minds cannot differ that the brochures urge Kean's defeat, the brochures fit squarely within the definition of express advocacy at 11 C.F.R. § 100.22(b).

C. **Potential Violations**

Because the brochures contain express advocacy, disbursements for them qualify as expenditures under 2 U.S.C. § 431(9)(A) even under the strictest interpretation of that term. The cost of the brochures likely exceeded $1,000, the statutory threshold for registration as a political committee. *See* First GCR at 9; 2 U.S.C. § 431(4)(A). Therefore, as more fully described in the First General Counsel's Report, these circumstances provide reason to believe that the Council may have violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee.[10]

A finding of reason to believe that the Council failed to register and report as a political committee would be consistent with Commission action in other recent matters.

Like the other matters, where only limited information existed at the time the Commission considered the complaints, here we also do not know the full extent of the Council's activities. Because the Council was not required to file reports with the IRS until after the New Jersey primary election, it is unknown what other activities the Council funded in 2000. In media reports, representatives of the Council stated that they spent $65,000 in Kean's congressional district and planned to spend $100,000 more there; other reports state that the Council also aired similar advertisements in Idaho attacking a Republican candidate in a congressional primary there.

Here, as in the recent matters, a constellation of factors support investigating whether the Council should be registering and reporting as a political committee. Among these are public

[10] To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See, e g., Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. Here, the Council's major purpose—and indeed only purpose—appears to be influencing elections. One Council board member, for example, reportedly stated, "The very purpose of our group is to influence the outcome of elections," according to the complaint.

statements by the Council's officers that the organization sought to influence the election in Kean's district: "The outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy. Clearly, we believe Mr. Ferguson [Kean's opponent] is a candidate whose record and philosophy is consistent with our philosophy." Another is the Council's registration with the IRS as a Section 527 organization, itself a statement that the organization intended in general to influence elections. Another is the distribution of the brochures at issue in this case. Thus, there is a sufficient basis to inquire into the contributions that the Council may have received or expenditures that it may have made among the hundreds of thousands of dollars that it has raised and spent.[11] *See id.*

As an alternative to finding that the Council should be registering and reporting as a political committee, the Commission could find that the Council made prohibited corporate independent expenditures by financing and distributing communications that expressly advocated the defeat of a federal candidate. *See* 2 U.S.C. § 441b(a). As discussed in the First General Counsel's Report, two of the Council's officers—William "Bill" Wilson and Gary Glenn—appear to have consented to such a prohibited expenditure. *See* First GCR at 15-16. Regardless of which theory is pursued, though, a finding of express advocacy also leads to a violation of the Act's disclaimer requirements, because the brochures fail to note whether they were authorized by a candidate or candidate's committee. *See* 2 U.S.C. § 441d(a). Finally, there is no information to change the prior conclusion that the complaint failed to allege sufficient facts to support findings that the Council coordinated expenditures for the brochures with Kean's

[11] During the reporting period after the New Jersey primary election in 2000, the Council reported in its IRS reports that it received no receipts and made only $2,627 in disbursements. In 2001, the Council reported $50,000 in receipts and no disbursements. In 2002, the last year that the Council filed reports, it reported $265,000 in receipts—of which $250,000 was from Club for Growth—and made $261,343 in disbursements, of which $250,000 was spent on a media buy. IRS regulations also would allow the Council to avoid disclosing receipts by paying taxes on them.

opponent. Those allegations were purely speculative and specifically countered by the Council's denial.

Therefore, as in the First General Counsel's Report, this Office recommends that the Commission find reason to believe that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. §§ 433, 434, 441d(a) or in the alternative that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. §§ 441b(a), and 441d(a); and that William "Bill" Wilson and Gary Glenn, as corporate officers of the Council, violated 2 U.S.C. § 441b(a).

V. INVESTIGATIVE PLAN

1
2
3
4
5
6
7

VI. RECOMMENDATIONS

1. Find reason to believe that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. §§ 433, 434, 441d(a), or, in the alternative, that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. §§ 441b(a) and 441d(a) and that William "Bill" Wilson and Gary Glenn, as corporate officers of the Council, violated 2 U.S.C. § 441b(a);

2. Approve the appropriate factual and legal analyses;

3.

4. Approve the appropriate letters.

3/16/05
Date

Lawrence H. Norton
General Counsel

Rhonda J. Vosdingh
Associate General Counsel for Enforcement

Lawrence L. Calvert, Jr.
Deputy Associate General Counsel for Enforcement

Brant S. Levine
Attorney

Attachments:

1. Remand Order
2. Text of 11 C.F.R. § 100.22

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEAN FOR CONGRESS COMMITTEE **Plaintiff,** **v.** **FEDERAL ELECTION COMMISSION** **Defendant.**	**Civil Action No. 04-0007 (JDB)**

ORDER

Defendant Federal Election Commission ("FEC" or "Commission") moves to voluntarily remand this case, and to hold the summary judgment briefing schedule in abeyance, so that it may apply the Supreme Court decision in McConnell v. FEC, 540 U.S. 93 (2003), to the facts of the Kean for Congress Committee's ("Kean Committee") administrative complaint. FEC asks for 60 days to reconsider its dismissal of Kean Committee's complaint. Kean Committee opposes the motion on the grounds that FEC already had an opportunity to consider the McConnell decision prior to issuing its Statement of Reasons ("SOR").

On November 4, 2003, the Commission was divided 3 to 3 on whether to proceed with Kean Committee's administrative complaint. Def. Mot., Ex. 1. Without the necessary four votes, the Commission voted unanimously to dismiss the complaint and close the case. Id. On December 10, 2003 the Supreme Court issued its decision in McConnell, which addressed the constitutionality of certain provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA").

On December 16, 2003, the three Commission members who voted to proceed with Kean

Committee's administrative complaint issued their SOR, which provided an explanation of why they believed CRG violated federal election laws. See Pl. Summ. J. Mot., Ex. 3. Then, on January 13, 2004, the three members who found that there was not reason to believe CRG violated federal election laws issued their SOR. See Def. Mot., Ex. 2. Both SOR's acknowledged the existence of the decision in McConnell, but neither considered that decision in justifying action with regard to the Kean Committee's administrative complaint. The FEC now moves for a remand so that it can consider the impact of McConnell on Kean Committee's complaint.

The decision to grant a motion to remand is contingent upon the circumstances in which a motion for remand is requested. A remand is generally granted if an intervening event "affect[s] the validity of the agency action." SKF USA Inc. v. United States, 254 F.3d 1022, 1028 (Fed. Cir. 2001) (citing Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993)). Additionally, when an agency seeks a remand because it now believes its earlier decision was wrong, remand is generally appropriate. See SKF USA, 254 F.3d at 1029. However, when an agency wants merely to reconsider an earlier decision, it is a closer call whether remand is appropriate. See Southwestern Bell Tel. Co. v. FCC, 10 F.3d 892, 896 (D.C. Cir. 1993) (discussing an earlier grant of remand to FCC to reconsider its decision).

In the present action, FEC describes its motion for remand as arising from an intervening judicial decision. However, the intervening decision, McConnell, actually occurred prior to the Commission members issuing their SORs, and hence could have been considered then. Notwithstanding FEC's failure to apply McConnell in the first instance, however, this Court will grant FEC's motion for remand so that the FEC can apply the McConnell decision to the facts of the Kean Committee's complaint.

This Court is well aware of the significant time -- almost five years -- that has passed since the Kean Committee first filed its administrative complaint with the FEC. The Court will not permit this matter to languish unduly with the FEC in light of that history. Therefore, this matter will be remanded for the sole purpose of permitting the FEC to apply McConnell to the facts of the Kean Committee's administrative complaint; the remand is for a period not to exceed 60 days from the date of this Order.

Accordingly, it is hereby

ORDERED that defendant's motion to remand is **GRANTED**; it is further

ORDERED that MUR 5024 is remanded for a period ending April 15, 2005 to permit the FEC to reconsider its decision to dismiss Kean Committee's administrative complaint in light of the Supreme Court decision in McConnell v. FEC, 540 U.S. 93 (2003); it is further

ORDERED that defendant's motion to hold summary judgment in abeyance is **GRANTED**, and the summary judgment briefing schedule shall be suspended pending disposition of the remand; and it is further

ORDERED that a status conference is scheduled for April 15, 2005 at 9:15 a.m.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: February 15, 2005

TITLE 11--FEDERAL ELECTIONS

CHAPTER I--FEDERAL ELECTION COMMISSION

PART 100_SCOPE AND DEFINITIONS (2 U.S.C. 431)

Subpart A_General Definitions

Sec. 100.22 Expressly advocating (2 U.S.C. 431(17)).

Expressly advocating means any communication that--(a) Uses phrases such as ``vote for the President,'' ``re-elect your Congressman,'' ``support the Democratic nominee,'' ``cast your ballot for the Republican challenger for U.S. Senate in Georgia,'' ``Smith for Congress,'' ``Bill McKay in '94,'' ``vote Pro-Life'' or ``vote Pro-Choice'' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, ``vote against Old Hickory,'' ``defeat'' accompanied by a picture of one or more candidate(s), ``reject the incumbent,'' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say ``Nixon's the One,'' ``Carter '76,'' ``Reagan/Bush'' or ``Mondale!''; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because--

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

[60 FR 35304, July 6, 1995]